BEST AVAILABLE COPY

(3)

Supreme Court U.S.
FILED
JUL 20 1995
CLERK

No. 94-1453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

D. GRANT PEACOCK,
Petitioner,

v.

JACK L. THOMAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

DAVID L. FREEMAN
(Counsel of Record)
J. THEODORE GENTRY
WYCHE, BURGESS, FREEMAN & PARHAM, P.A.
P.O. Box 728
Greenville, SC 29602
(803) 242-8200
Counsel for Petitioner

JAMES R. GILREATH
JAMES R. GILREATH, P.A.
110 Lavinia Avenue
P.O. Box 2147
Greenville, SC 29602
(803) 242-4727
Counsel for Respondent

J. KENDALL FEW
(Counsel of Record)
P.O. Box 10085
Greenville, SC 29603
(803) 232-6456
Counsel for Respondent

PETITION FOR CERTIORARI FILED MARCH 1, 1995
CERTIORARI GRANTED MAY 22, 1995

TABLE OF CONTENTS

	Page
Chronological List of Relevant Docket Entries	1
Order of Judge G. Ross Anderson, Jr. in Thomas v. Tru-Tech, Filed and Entered Nov. 28, 1988	3
Unpublished Opinion of the Court of Appeals for the Fourth Circuit in Thomas v. Tru-Tech, Argued Jan. 10, 1990 and Decided April 3, 1990	32
First Amended Complaint, Filed Feb. 7, 1992	44
Answer of D. Grant Peacock to the First Amended Complaint, Filed Mar. 3, 1992	52

The following opinions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Order of the United States District Court for the District of South Carolina, entered on June 24, 1992	54a
Order, Findings of Fact and Conclusions of Law of the United States District Court for the District of South Carolina, entered on October 28, 1992	30a
Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit, dated November 4, 1994	1a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Dec. 23, 1991—Plaintiff Thomas' original complaint filed in the U.S. District Court for the District of South Carolina, Spartanburg Division.

Feb. 7, 1992—Plaintiff Thomas' first amended complaint filed.

March 3, 1992—Defendant Peacock's answer to first amended complaint filed.

April 15, 1992—Defendant Peacock's motion to dismiss plaintiff's complaint or, in the alternative, to transfer case to the Western District of Pennsylvania, supporting memorandum and affidavit filed.

June 24, 1992—Order denying motion to dismiss or, in the alternative, to transfer case to the Western District of Pennsylvania.

Aug. 25, 1992—Bench trial held before Judge William B. Traxler, Jr.

Oct. 28, 1992—Order, Findings of Fact and Conclusions of Law that plaintiff shall have judgment against Peacock.

Oct. 28, 1992—Judgment of District Court awarding plaintiff Thomas judgment in the amount of $187,628.93 together with interest at the rate of 8.55% and costs under 29 U.S.C. 1132(q) entered against defendant Peacock.

Nov. 25, 1992—Notice of Appeal filed by Peacock.

March 1, 1993—Brief and Joint Appendix filed by appellant Peacock.

April 15, 1993—Brief filed by appellee Thomas.

April 29, 1993—Reply Brief filed by appellant Peacock.

May 9, 1994—Oral argument heard.

Nov. 4, 1994—Published, authored opinion and Judgment of the Court of Appeals for the Fourth Circuit filed.

Nov. 18, 1994—Petition for Rehearing filed by appellant Peacock.

Dec. 2, 1994—Court Order filed denying motion for rehearing and denying suggestion for rehearing in banc.

[Entered Nov. 28, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

C/A No. 87-2243-3

JACK L. THOMAS, Individually, on Behalf of the Tru-Tech, Inc., Pension Plan, and as Representative of a Class of Plaintiffs Similarly Situated,

Plaintiffs,

vs.

TRU-TECH, INC.; D. GRANT PEACOCK; GRANT PEACOCK AND CO., INC.; and CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Defendants.

ORDER

This class action was brought under the Employee Retirement Income Security Act of 1974, 29 *U.S.C.* § 1001, *et seq.* The plaintiff class consists of former salaried employees of the defendant Tru-Tech, Inc. The plaintiffs claim that the defendants represented to the class that they would be covered by a pension plan. The pension plan was to be effective on October 1, 1981 according to a summary plan descripiton which was distributed to the class in August of 1982. The majority of the class had been previously employed by the Draper Division of Rockwell International and their former service with Draper was to be counted toward vesting with Tru-Tech.

The amended complaint alleges that each of the defendants exercised discretionary authority, control or responsibility over the administration and management of the

plan and, therefore, were fiduciaries under the plan. The amended complaint then alleges that they breached their fiduciary duties to the plaintiff class by:

1. Failing to properly fund the plan.

2. Failing to have the plan approved by IRS.

3. Using the tentative disapproval by IRS as a pretext to terminate the plan and refund contributions to the defendant.

Two other causes of action allege breach of contract and civil conspiracy. The defendants filed a general denial.

The primary contention of the plaintiffs is as follows: After initiating the plan Tru-Tech began to experience financial difficulties. They obtained a deferment of contributions. The IRS then notified Tru-Tech that its proposed 10 year cliff vesting schedule was not acceptable. A previous resolution of the Board of Directors had authorized the executive officers of Tru-Tech to make technical or administrative amendments to the plan. Tru-Tech's President and Secretary executed an amendment to the plan pursuant to this resolution, changing the vesting schedule to 4-40. The plan was then given preliminary approval by IRS. Subsequently, plaintiffs allege that the defendants conspired together to convince the IRS that this amendment was without authority. In doing so, they misrepresented to the IRS that the President had executed the resolution for his own financial benefit. They also failed to disclose the previous resolution of the board authorizing the executive officers to make technical or administrative amendments to the plan. Later they conspired together to prevent the class from learning of these developments.

THE EVIDENCE

On December 4, 1981, the Board of Directors of Tru-Tech elected B. W. Wilcock President and B. J. Myers, Jr. Assistant Secretary and Treasurer. At the same meeting, defendant Grant Peacock, as Chairman of Tru-Tech, presented a Defined Contribution Pension Plan for Salaried Employees which Tru-Tech had entered into with Connecticut General Life Insurance Company. A resolution was then passed authorizing "the executive officers of the corporation" to "make such technical or administrative amendments to the plans . . . as they in their discretion deem advisable or as may be requested by the Internal Revenue Service . . . ." [Plaintiffs' Exhibit #21.]

About this time, it was represented to the salaried employees that this plan was in existence and, in August of 1982, a plan booklet was distributed to the class representing that the pension plan had become effective on October 1, 1981. [Plaintiffs' Exhibit #28.] This booklet represented to the salaried employees that specific contributions would be made to the plan by Tru-Tech. Although the plan itself [Plaintiffs' Exhibit #13] states that it was subject to approval by IRS, no such statement is contained in the plan booklet. The plan provided for 10 year cliff vesting.

The plan was not submitted to the IRS for approval until December 31, 1982 [Plaintiffs' Exhibit #1]. This submission shows that 14 of the 25 (56%) of the salaried employees included in the "employee census" had more than 10 years of service and 3 others had 9 years of service (68% had 9 years or more toward vesting) at that time.

At a meeting of the Tru-Tech Board of Directors on January 7, 1983, the defendant Grant Peacock presented what he called "several technical amendments" to the retirement plan for hourly rated employees including a change in the "service requirement for disability benefits." [Plaintiffs' Exhibit #22.]

On June 14, 1983, Tru-Tech filed its federal corporate income tax return in which it deducted payments to its

pension and profit sharing plans in the amount of $30,516.00. [Plaintiffs' Exhibit #26, 1. 24].

On July 23, 1983, the Internal Revenue Service responded to Tru-Tech's request for approval of the pension plan stating in part as follows:

> Section 11 of the adoption agreement indicates that the employer has elected cliff vesting. Cliff vesting is not acceptable for initial qualifications. The vesting schedule elected must be as good as the 4-40 vesting schedule or better. Never more stringent. Amend plan or adoption agreement to incorporate a liberal vesting schedule . . . . [Plaintiffs' Exhibit #2, item 1].

On the copy of this document maintained in the Tru-Tech files and produced by them through discovery, the word "done" is handwritten by some unidentified employee of Tru-Tech following this request. [Plaintiffs' Exhibit #2].

On September 14, 1983, less than two months after the request by IRS for a change in the vesting schedule, Tru-Tech's President, B. W. Wilcock, and Assistant Secretary, B. J. Myers, Jr., executed an amendment to the Tru-Tech pension plan which reads as follows:

> Effective October 1, 1981, Section XII—Vesting Percentage, Section 1.42 is hereby amended to elect "f"—40% after 4 years of Service; 5% for each of the next 2 Years of Service; 10% for each Year of Service thereafter. [Plaintiffs' Exhibit #4].

At the same time, another amendment to the pension plan was adopted changing the minimum age requirement to 24 years. [Plaintiffs' Exhibit #5].

A copy of the "adoption agreement" between Tru-Tech and Connecticut General for the pension plan was obtained during discovery from attorney Robert Johnson of Buchanan Ingersoll, Tru-Tech's corporate counsel.

[Plaintiffs' Exihibit #12]. This document shows that it was executed on December 29, 1981 by Tru-Tech's President, B. W. Wilcock. It further shows that Section XII, "Vesting Percentage" was originally marked with a typed "X" next to item (d): "100% after 10 Years of Service," commonly called 10 year cliff vesting. [Plaintiffs' Exhibit #12, page 4.] Handwritten notes adjacent to this section read "amendment * change to F." [Plaintiffs' Exhibit 12, page 4]. Item (f) reads: "*40% after 4 Years of Service; 5% for each of the next 2 Years of Service; 10% for each Year of Service thereafter," commonly called a 4-40 vesting schedule or 4-2-2.

In December of 1983 and again in June of 1984, there is correspondence between Tru-Tech, Grant Peacock and Company and Tru-Tech's corporate attorneys, Buchanan Ingersoll, concerning the deductibility of contributions to the pension plan [see Plaintiffs' Exhibits 29 and 24]. There are also handwritten notes entitled "Tru-Tech Salaried Pension Plan" which were obtained by the plaintiffs during discovery from Robert Johnson of Buchanan Ingersoll which state as follows:

> 1. Plans filed with IRS in January '83 for determination letters with Atlanta District Director.
>
> 2. Plan amendment and request for funding waiver and determination letter on amendment, filed April 14, 1983.
>
> 3. Some time in spring '83 I think B.J. told me that IRS requested some amendments within 30 days, which had not been sent, and that IRS said it would close file.
>
> 4. Pension Plan Section 15.7 blows up plan only if there is an initial *final* adverse ruling by IRS.
>
> 5. Only likely way to get initial adverse ruling is to ask IRS where case stands—must supply IRS

case number, ETC.—and press for final determination.

6. *Fiduciary implications*: Board's decision in first place whether to adopt a plan in first place and choice of discretionary plan design features, is probably not a fiduciary decision. However, if amendments requested by IRS were of minor technical nature—query whether fiduciary breach not to take appropriate action to make amendments. Bill Wilcock is certainly bright enough to think of this, but may not assert it. Query—scope of release. [Plaintiffs' Exhibit #23].

On July 23, 1984, T. H. Williams wrote a letter to the IRS as Executive Vice President of Tru-Tech [Plaintiffs' Exhibit #6]. The same T. H. Williams also served as Executive Vice President of the defendant Grant Peacock and Co., Inc. [see Plaintiffs' Exhibit #17]. This letter stated in part as follows:

> . . . we promised the salaried employees a pension plan and agreed to credit them with previous service at Rockwell for calculation of vesting . . . .
>
> When the plan was submitted with a 10 year cliff vesting provision, the IRS requested we change it to 4-2-2 or the plan would not be approved. On September 18, 1983, almost 2 years after the supposed effective date of the plan, the President of the company submitted the amendment converting to 4-2-2 and the IRS subsequently approved the plan.
>
> Legally, however, such an amendment was not approved by the Board of Directors . . . . As it turns out, the President, Bill Wilcock, was at the time in serious disagreement with the board and resigned from the company 3 weeks later on October 4, 1983. Mr. Wilcock had a direct financial gain associated with filing an amendment converting the investment provisions to 4-2-2.

> The position of True-Tech is simple. The Board of Directors approved a 10 year vesting schedule only . . . . Therefore, please either accept the 10 year cliff vesting or disapprove the plan. [Plaintiffs' Exhibit #6].

On August 21, 1984, T. H. Williams again wrote to the IRS as Executive Vice President of Tru-Tech stating in part as follows:

> . . . we have decided to withdraw our request for IRS approval and qualification of this proposed plan. [Plaintiffs' Exhibit #7].

The following day T. H. Williams again wrote to the IRS stating in part as follows:

> . . . we have decided that, for the reasons described in my letter of July 23, 1984, we cannot amend the plan to adopt the 4-2-2 vesting schedule which the IRS requested as a precondition to issuance of a favorable determination letter . . . . Accordingly, please issue an adverse determination on our application so that we may move on to a consideration of alternative ways of providing retirement benefits for our employees. [Plaintiffs' Exhibit #8].

On October 22, 1984, the Board of Directors of Tru-Tech issued an amendment to the Tru-Tech pension plan executed by the defendant Grant Peacock as Chairman and attested by T. H. Williams as Assistant Secretary, which stated in part as follows:

> WHEREAS, on September 14, 1983, Section XII—Vesting Percentage, Section 1.42 was amended by the President of the Company and submitted to the Internal Revenue Service without appropriate Board of Directors' approval;
>
> THEREFORE, effective October 1, 1981, Section XII—Vesting Percentage, Section 1.42 is hereby

> confirmed and continued in force to this day to elect 'd' 100% after 10 years of service. [Plaintiffs' Exhibit #10].

The same day, T. H. Williams as Executive Vice President of Tru-Tech wrote the IRS enclosing the amendment stating in part as follows:

> . . . it is our position that the amendment filed September 14, 1983 by B. W. Wilcock, adopting a 4-2-2 vesting schedule was not authorized and that the amendment herein attached merely confirms the original election by the board . . . . [Plaintiffs' Exhibit #9].

On January 31, 1985, the District Director of IRS wrote Tru-Tech stating that the pension plan "does not meet the requirements of Section I of the Internal Revenue Code." [Plaintiffs' Exhibit #11]. Attached to this adverse determination letter was a 4 page document entitled "Explanation of Items" and another document outlining the appeal procedure for adverse determination letters. The document entitled "Explanation of Items" outlined the following facts:

1. On December 29, 1981, Tru-Tech adopted the Connecticut General prototype plan effective October 1, 1981.

2. On April 14, 1983, Tru Tech submitted the plan for approval to the IRS together with a request for waiver of funding for the plan year ending September 30, 1982.

3. Prior to submission of the plan to the national office, the IRS regional office requested an amendment of the 10 year cliff vesting schedule.

4. On September 14, 1983, Tru-Tech amended the plan to elect the 4-40 vesting schedule in lieu of the 10 year cliff vesting schedule.

5. "The Waiver of Minimum Funding and the Amendment to the Plan" was approved on May 30, 1984 as a National Office Technical Advice Memorandum.

6. On July 23, 1984, Tru-Tech wrote IRS stating that the September 14, 1983 amendment had not been approved by the Board of Directors and that "it was their wish to maintain a 10 year cliff vesting schedule."

7. On August 22, 1984, Tru Tech requested an adverse determination letter.

8. In connection with the request for an adverse determination letter "on August 22, 1984, Tru-Tech, Inc. adopted an amendment to the adoption agreement changing the 4-40 vesting schedule back to the 10 year 'cliff' vesting previously selected." [Plaintiffs' Exhibit #11].

When no appeal was initiated by Tru-Tech, the IRS issued a final adverse determination letter on May 23, 1985. [Plaintiffs' Exhibit #11a].

On June 14, 1985, Buchanan Ingersoll as corporate counsel for Tru-Tech wrote to T. H. Williams as Executive Vice President of the defendant Grant Peacock and Co. enclosing a draft of a proposed letter to the class representative's lawyer for signature by John Blackman as President of Tru-Tech. This letter to Williams stated in part as follows:

> There should be attached to the letter copies of the Plan and Adoption Agreement and a copy of the first page of the IRS adverse determination letter. [Plaintiffs' Exhibit #11]. While I do not believe you are required to provide any portion of the IRS letter to his lawyer, giving him at least the first page (and not the explanation) [the "Explanation of Items" attachment] should give him independent confirmation of the plan never being qualified. I suggest that any marginal notations on the copies of the Plan and Adoption Agreement [Plaintiffs' Exhibit #12] that are provided to his lawyer be re-

moved, as these are not part of the official documents. [Plaintiffs' Exhibit #17].

On June 21, 1985, John Blackman as President of Tru-Tech wrote to the class representative's attorney as previously instructed by Buchanan Ingersoll enclosing a copy of the IRS adverse determination letter without attachments stating in part as follows:

> . . . I am . . . enclosing a copy of a letter recently received from the Internal Revenue Service denying qualifying status for this pension plan, retroactive to its initial effective date. Because of this adverse determination by the Internal Revenue Service, the Plan . . . is deemed not to have existed and all contributions are refundable to Tru-Tech, Inc. For this reason, Mr. Thomas is not entitled to any benefits from the Plan. [Plaintiffs' Exhibit #16].

Tru-Tech then notified the remaining salaried employees on July 25, 1985 of the IRS adverse determination letter stating in part as follows:

> As a result of this ruling there can be no pension benefits paid to you under Tru-Tech, Inc.'s proposed plan. [Plaintiffs' Exhibit #15].

In addition to the exhibits outlined above, plaintiff submitted deposition testimony of several witnesses whose testimony is outlined below:

1. B. W. Wilcock, who served as President of Tru-Tech until his termination in early October of 1983, testified that when the pension plan was adopted it was Tru-Tech's intention to have it qualified by IRS [3 (16-24)]. He denied that the resolution changing the vesting schedule from 10 year cliff vesting to 4-40 was done for his own financial benefit [4 (12-19)] and testified that when this amendment was adopted he had no indication that his continued employment was in jeopardy [4 (20-24)]. With respect to Tru-Tech's representation to IRS in Plaintiffs' Exhibit #6 that "the Board of Directors approved a

10 year vesting schedule only," Mr. Wilcock testified as follows:

> I don't recall any board meeting at which that was ever discussed, must less decided. So if it was done it would have to have been done in a meeting I did not attend or wasn't aware of or after I was gone. [5 (6-9)].

It should be noted that Mr. Wilcock was present at the December 4, 1981 meeting of the Board of Directors where the retirement plan was approved and ratified [Plaintiffs' Exhibit #21] and signed the adoption agreement on behalf of Tru-Tech on December 29, 1981 [Plaintiffs' Exhibit #12].

With respect to representations made to the class concerning the pension plan, Mr. Wilcock testified as follows:

> . . . it was explained that the programs were going to be as similar as practical in their overall benefits to the Rockwell plans, but since we were a smaller company and so on, so forth, it might not be identical; but in any event, they should rest assured in this transition they would end up with the plans. [5 (20-25)].

Asked specifically about the 10 year vesting schedule he testified as follows:

> Q. Was there ever any hard and fast determination or principle on the part of the company that there would only be a 10 year vesting schedule?
>
> A. There was never—it's opposite as you can get. There was never any discussion of any technical details of the plan by the board. The whole thing was to provide the employees with a sense of security so that they would be there for the company after Rockwell sold it. [6 (1-9)].

Wilcock testified that the "broad purpose" for adopting the plan was to ensure that the salaried employees would not leave the company [8 (20)-9 (2)].

Q. From your observation was the adoption of the plan successful in that regard?

A. Sure, we didn't lose anybody. [9 (3-5)].

2. B. J. Myers, Vice President of Finance for Tru-Tech from September of 1981 through August of 1984, testified that the amendments to the pension plan changing the 10 year cliff vesting to 4-40 would not have been originated in the Tru-Tech offices where he and B. W. Wilcock worked:

Q. Where would that document have come from?

A. It would have probably come out of Buchanan Ingersoll's office or Grant Peacock's office or possibly out of the insurance company . . . . [4 (13-15)].

3. Thomas H. Bishop, Vice President of the Eckenrode Agency, was involved in the adoption of the plan. When asked whom he represented, he stated: "I feel more like I represented Tru-Tech . . . ." [7 (10)]. He testified that he prepared the amendment changing the vesting schedule at the request of the IRS [8 (16-20)]. Concerning the complexity of the amendment, he testified as follows:

I don't recall what the vesting was. They [IRS] wanted 4 and 40 rule vesting after four years, vesting after 7 years, I believe. The IRS requested that to be made. We could have gone to an attorney and drawn up a change and he would have done that amendment. Really, it's a very simple amendment to do. We went ahead and did it. [8 (19)-9 (3)].

He further testified as follows:

As far as I know, there were other amendments, and if they were very minor in nature, we could have very easily have done them. If they were not minor in nature, then, we would turn them over to a law firm to draw them up. I guess they become specific in wording. When we changed the vesting amendment, all we did is fill in the 4-40. Nothing complicated in the wording . . . . [9 (16-24)].

He further testified that it appeared to him that the Eckenrode Agency would have sent the executed vesting schedule amendments to the IRS. [15 (20-23)].

With respect to clearing the vesting schedule amendment with Robert Johnson of Buchanan Ingersoll, Tru-Tech's corporate counsel, Mr. Bishop testified as follows:

Unfortunately, I do not believe, either Bill [Wilcock] or myself had spoken to him [Robert Johnson] regarding the amendment just to be sure—maybe it was Bill that had talked to him. It was okay to go to the 4-40 and there was no reason to keep the vesting with the IRS. But, I don't recall whether I talked to him or whether Bill Wilcock talked to him. [17 (10-17)].

4. Robert A. Johnson, a partner in the Buchanan Ingersoll firm, testified that Tru-Tech's decision to revoke the plan "took into account the fact that they were cash poor." [14 (4-8)].

With respect to the correspondence between T. H. Williams and the IRS, Mr. Johnson testified as follows:

Q. Was it your impression that he [Williams] was primarily interested in obtaining an adverse determination letter?

A. I had advised him that if the Internal Revenue Service issued an adverse determination letter, then Tru-Tech had the right, under the plan, to revoke it and recover contributions . . . . [17 (11-17)].

5. The defendant Grant Peacock testified by deposition that he was aware of the fact that Tru-Tech had placed Mr. Wilcock in a position of authority to speak for the company. [35 (5-8)]. He also admitted that Mr. Wilcock had authority to deal with the salaried employees with respect to the plan. [35 (16-24)]. He further testified as follows:

Q. Did you ever tell Mr. Wilcock at any time, Mr. Wilcock, you do not have authority to make representations to the Internal Revenue Service?

A. No.

Q. Did you ever tell Mr. Wilcock at any time that as President of the corporation that he did not have authority to make representations to the beneficiaries of the plan?

A. No.

Q. Is it not true that you generally relied upon Mr. Wilcock to administer the plan?

A. Yes. [50 (9-20)].

Mr. Peacock also testified that during the history of Tru-Tech he could not remember any resolution that was introduced by him which was not unanimously adopted by the Board of Directors. [9 (6-10)]. When asked whether he ever discussed a 10 year vesting schedule with the Board, he testified as follows:

Q. Did you ever discuss a 10 year vesting schedule with the Board of Directors initially?

A. I don't know the answer to that. [12 (8-10)].

At the trial, the class representative Jack Thomas testified that throughout the period of his employment with Tru-Tech, representations were made to salaried employees concerning the existence of the plan. In addition, T. H. Williams, whom the exhibits show acted as Executive Vice President both for Tru-Tech and Grant Peacock and Co., admitted that he made no investigation whatsoever to verify the accuracy of his representations to the IRS contained in Plaintiffs' Exhibit #6 that "Mr. Wilcock had a direct financial gain associated with filing an amendment converting the vesting provisions to 4-2-2."

DISCUSSION OF THE EVIDENCE AND FINDINGS OF FACT

It is clear from the evidence that Tru-Tech represented to its salaried employees that a pension plan had been enacted for their benefit. Both Thomas and Wilcock testified that this was the case. In addition, Tru-Tech admitted

as much in their July 23, 1984 letter to the IRS stating that "we promised the salaried employees a pension plan and agreed to credit them with previous service at Rockwell for calculation of vesting." [Plaintiffs' Exhibit #17]. Wilcock testified that the purpose of this representation was to retain the key employees and that they were successful because no key employees were lost.

Therefore, I find as a fact the following:

1. Tru-Tech represented to its salaried employees that they would be covered by a pension plan similar to the plan they enjoyed with Rockwell with service at Rockwell credited toward vesting. The purpose of this plan was to induce the former Rockwell employees to remain with Tru-Tech and such purpose was successfully obtained. Tru-Tech achieved additional benefits from the existence of the plan through tax deductions. [See Plaintiffs' Exhibit #26].

With respect to the specifics of the vesting schedule, there is no reference to any discussion by the Board of Directors of any specific vesting schedule at the meeting where the plan was approved. [Plaintiffs' Exhibit #21]. Mr. Peacock testified that he could not recall any discussion of a 10 year vesting schedule with the Board of Directors [Peacock deposition, 12 (8-10)]. Mr. Wilcock testified that there was no discussion of any specific vesting schedule by the Board of Directors and it appears that almost two-thirds of the affected employees had more than 10 years of vested service by 1984 when Tru-Tech sought to scuttle the plan. [See Plaintiffs' Exhibit #1]. Therefore, it is difficult to credit Tru-Tech's contention to the IRS in Mr. Williams' July 23, 1984 letter that the 4-40 schedule would have provided at that time less "incentive to retain valuable employees." By then the vast majority of the key salaried employees listed in Plaintiffs' Exhibit #1 would have been fully vested under either schedule. The proof is much more convincing that the primary reason Tru-Tech refused to acknowledge the 4-40 amendment was to obtain a return of the pension funds. [See Plaintiffs' Exhibit #23 and testimony of Robert Johnson].

This is underscored by Mr. Williams' letter of August 22, 1984 in which he requests an adverse determination letter so that Tru-Tech "may move on to a consideration of alternative ways of providing retirement benefits for our employees." [Plaintiffs' Exhibit #8]. Admittedly this was never done.

Consequently, I find as a fact the following:

2. The Tru-Tech Board of Directors made no specific specification of a particular vesting schedule but rather gave a general approval of a pension plan using "prototype documents developed by Connecticut General Life Insurance Company." [Plaintiffs' Exhibit #21, pages 66-67].

3. Because of the extent of previous vesting service earned with Rockwell, there was no significant difference in the incentive to retain valuable employees between the 10 year cliff and 4-40 vesting schedules at the time Tru-Tech attempted to repudiate the 4-40 amendment in July through October, 1984.

4. The true reason for Tru-Tech's repudiation of the 4-40 vesting amendment was to obtain a return of the pension funds previously paid into the plan and not to provide an incentive to retain valuable employees.

In its July 23, 1984 letter to the IRS, Tru-Tech strongly implies that Mr. Wilcock as President of Tru-Tech originated the 4-40 amendment for the purpose of furthering his own financial interests. To the contrary, the evidence clearly shows that the 4-40 amendment was initiated by the IRS, drafted by the Eckenrode Agency as agent for Tru-Tech, passed by Tru-Tech's corporate counsel for approval, executed by Wilcock and Myers and then returned to IRS by Eckenrode. The Eckenrode representative testified that either he or Wilcock referred it for approval to Tru-Tech's counsel and Tru-Tech's counsel's

own notes reflect that he was advised of the proposed amendment in the spring of 1983 by B.J. Myers. [Plaintiffs' Exhibit #23, ¶ 3].

Therefore, based on this evidence, I make the following additional finding of fact:

5. The 4-40 vesting amendment was requested by IRS, prepared by Tru-Tech's insurance agent, approved by Tru-Tech's counsel, executed by Tru-Tech's executive officers Wilcock and Myers, and returned to IRS by Tru-Tech's insurance agent.

The next question concerns the authority of Wilcock and Myers to execute the amendment. As executive officers of Tru-Tech they had previously been given authority by the Board of Directors to execute technical and administrative amendments which may be requested by IRS. In the sense that it is used here, I interpret the term "technical" to refer to the degree of substance or materiality of the amendment. While vesting provisions certainly may be considered to be substantive as opposed to technical in some situations, as where there is no previous credit toward vesting, there are other situations where vesting amendments are obviously technical.

If all the key employees had 10 years of service and were therefore vested under either schedule, it would be difficult to argue that the amendment would be material and therefore substantive as opposed to technical. Here it appears that at least two-thirds of the key employees would have been vested under either schedule, if not at the time of the amendment in September of 1983, certainly by the time the amendment was repudiated by Tru-Tech in the period of July through October of 1984. Therefore, under the circumstances, I have concluded that the amendment from 10 year cliff to 4-40 vesting was more technical than substantive in light of the fact that the vast majority of the key employees as reflected in

Plaintiffs' Exhibit #1 would have been vested under either schedule.

This finding is consistent with Plaintiffs' Exhibit #22 which Tru-Tech Chairman Grant Peacock presented "several technical amendments" including an amendment to the hourly pension plan changing the "service requirement" from 10 to 15 years. [See Plaintiffs' Exhibit #22, page 342]. The "service requirement" is similar in substance to the vesting schedule and, if a change in the "service requirement" is a "technical amendment," it follows that an amendment changing the vesting schedule may be technical as well.

In addition, it is the general rule that a corporation may be bound where its officer or agent acts without, or in excess of, his actual authority if he acts within the scope of apparent authority with which his corporation has clothed him. See *C.J.S.* Corporations § 994. Here the defendant Grant Peacock as Chairman of the Board of Tru-Tech has testified that he generally relied upon Mr. Wilcock to administer the plan and that he never attempted to limit Wilcock's authority to make representations to the IRS or to the beneficiaries of the plan. [See testimony of Peacock, *infra.*].

Therefore, I make the following additional findings of fact:

6. The September 14, 1983 amendment to the Tru-Tech pension plan as set forth in Plaintiffs' Exhibit #4 converting to a 4-40 vesting schedule was, under the circumstances, a technical amendment within the meaning of the December 4, 1981 resolution of the Tru-Tech Board of Directors as set forth in Plaintiffs' Exhibit #21 at page 67.

7. Wilcock and Myers had both actual and apparent authority to bind Tru-Tech in its dealings with and representations to IRS and the plan beneficiaries with reference to the existence of the Tru-Tech salaried pension plan and the validity of the 4-40 vesting amendment.

29 *U.S.C.* § 1053(c) specifically provides that once a vesting schedule becomes effective, it cannot be changed to a less favorable vesting schedule. Obviously the 10 year cliff vesting schedule is less favorable than the 4-40. Therefore, the question arises as to whether the 4-40 vesting schedule amendment became effective. The pension plan [Plaintiffs' Exhibit #13] in paragraph 15.7 on page 34 provides for approval by the Internal Revenue Service as follows:

> Notwithstanding any other provisions of this Plan, the Employer's adoption of this Plan is subject to the condition precedent that the Employer's Plan shall be approved and qualified by the Internal Revenue Service as meeting the requirements of § 401(a) of the Internal Revenue Code . . . .

The plaintiffs contend that the plan was "approved and qualified" within the meaning of this section and defendants contend that it was not. The Plaintiffs point to the language of the attachment to the initial IRS adverse determination letter stating that "the waiver of minimum funding and the amendment to the plan was approved on 5/30/84 as a National Office Technical Advice Memorandum" [Plaintiffs' Exhibit #11, page 38]. They also point to the language of Tru-Tech's July 23, 1984 letter which specifically states that following the 4-40 amendment "the IRS subsequently approved the plan. [Plaintiffs' Exhibit #6].

Paragraph 15.7 of the plan makes no reference to a "final approval" by IRS but only to an approval and qualification by IRS that the plan is "meeting the requirements of § 401(a) of the Internal Revenue Code." It is obvious from the language of Plaintiffs' Exhibit #11 that following the 4-40 amendment the plan received at least preliminary approval by the IRS and it is further

obvious that after the 4-40 amendment the plan did meet the requirements of § 401(a) of the Internal Revenue Code. For this reason, I have concluded that the plan did, in fact, receive the "approval by the Internal Revenue Service" specified in paragraph 15.7 and further that after such approval the attempted reversion to the 10 year cliff vesting schedule [See Plaintiffs' Exhibit #10] was invalid under paragraph 15.3 of the plan which provides as follows:

> CONDITIONS OF AMENDMENT. Neither the Sponsor nor Employer shall make any amendment which would cause the Plan to lose its status as a qualified plan within the meaning of § 401(a) of the Internal Revenue Code. [Plaintiffs' Exhibit #13, page 33].

Based on the above, I make the following additional findings of fact:

8. Following the adoption of the 4-40 vesting schedule the plan did, in fact, meet the requirements of § 401(a) of the Internal Revenue Code and was, in fact, approved and qualified by the Internal Revenue Service within the meaning of paragraph 15.7 of the plan.

9. The subsequent attempted amendment by the Tru-Tech Board of Directors back to the 10 year cliff vesting schedule was invalid under the provisions of paragraph 15.3 of the plan.

With respect to the question of who are plan fiduciaries, section 1.26 of the plan states that the term fiduciary includes any fiduciary "designated by the employer in its adoption agreement." [Plaintiffs' Exhibit #13, page 5]. The adoption agreement designates Tru-Tech as the named fiduciary [Plaintiffs' Exhibit #12, page 4, ¶ VIII]. The question remains as to whether the remaining defendants exercised discretionary authority or control over the management or administration of the plan or the disposition of its assets.

While Tru-Tech shared offices in Pittsburgh with Grant Peacock & Co., Inc. and certain individuals were officers of both companies, there is no suggestion that Grant Peacock & Co., Inc. exercised any authority or control in connection with the Tru-Tech salaried pension plan or for that matter, any of the affairs of Tru-Tech.

Grant Peacock's position as a director and officer of Tru-Tech would not alone be sufficient to make him a fiduciary. The Labor Department in an interpretative bulletin addressing this issue states in part as follows:

> D-4 Q: In the case of a plan established and maintained by an employer, are members of the board of directors of the employer fiduciaries with respect to the plan?
>
> A. Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries *only to the extent that they have responsibility for the functions described in Section 3(21)(A) of the Act.*
>
> * * *
>
> D-5 Q: Is an officer or employee of an employer or employee organization which sponsors an employee benefit plan a fiduciary with respect to the plan solely by reason of holding such office or employment if he or she performs none of the functions described in Section 3(21)(A) of the Act?
>
> A: No. . . .

ERISA Interpretative Bulletin 75-8, 29 C.F.R. § 2509. 75-8 (1983) (emphasis added). A number of circuit courts have adopted the same or a similar approach. *See, e.g., Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 884 (1987), 107 S.Ct. 1298 (1987); *Trenton v. Scott Paper Co.*, 832 F.2d 806 (3rd Cir. 1987).

Even where an individual or corporation is a plan fiduciary, not all actions are fiduciary in nature:

> When an employer acts as a plan fiduciary, it wears "two hats," and assumes fiduciary status only when it functions as a fiduciary and not when it is conducting business not regulated by ERISA. The Department of Labor has taken the position that "settlor functions" relating to the formation, design and termination of plans are not fiduciary activities.

Ogden v. Michigan Bell Telephone Co., 657 F.Supp. 328, 333 (E.D. Mich. 1987) (citations omitted).

At most, Grant Peacock, as chairman of the board of Tru-Tech, was involved along with the other members of the board of directors in the business decisions relating to the formation and design of the salaried pension plan. These were not fiduciary decisions, but were business decisions relating to the design features of the pension plan. Therefore, I make the following finding of fact:

10. Neither D. Grant Peacock & Co. nor D. Grant Peacock exercised discretionary authority and control over the management and administration of the plan and the disposition of its assets.

Based on the above findings of fact, I make the following conclusions of law on the issue of liability:

CONCLUSIONS OF LAW

1. The purpose of ERISA is to protect the interest of the participants in the pension plan. *See* 29 *U.S.C.* 1001(b). Section 1104(a) provides that a fiduciary should discharge his duties with respect to the plan solely for the interest of the participants and beneficiaries and for the *exclusive* purpose of providing benefits. In addition, Article XI, § 11.1 of the plan provides as follows:

> GENERAL FIDUCIARY STANDARD OF CONDUCT. Each Fiduciary of the Plan shall discharge his duties hereunder solely in the interest of the Participants and their Beneficiaries and for the exclusive purpose of providing benefits to Participants and their Beneficiaries and defraying reasonable expenses of administering the Plan . . . . [Plaintiffs' Exhibit #13, page 27].

2. The defendant Tru-Tech constituted a fiduciary of the plan within the meaning of 29 *U.S.C.* § 1002(21)(A). Neither D. Grant Peacock & Co. nor D. Grant Peacock were fiduciaries under that section.

3. As a fiduciary, Tru-Tech may be liable under 29 *U.S.C.* § 1109(a) which provides as follows:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this [Act] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . .

4. Tru-Tech represented to the plan participants that the plan was in effect and they relied upon such representation.

5. The 4-40 vesting amendment executed on September 14, 1983 [Plaintiffs' Exhibit #4] was valid and resulted in an approval by the Internal Revenue Service within the meaning of paragraph 15.7 of the plan.

6. The amendment by which Tru-Tech attempted to revert to the 10 year cliff vesting schedule violated the provisions of paragraph 15.3 of the plan and of 29 *U.S.C.* § 1053(c) and was therefore invalid.

7. The resulting return of the plan proceeds to Tru-Tech and Tru-Tech's failure to fund the plan as provided in the plan documents were the result of a breach of fiduciary duty by Tru-Tech, which proximately resulted in damages to the plan and its beneficiaries.

8. The common law claims of fraud and civil conspiracy (Counts III and IV) are pre-empted by ERISA. *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549, 1553 (1987); *Salomon v. Transamerica Occidental Life Ins. Co.*, 801 F.2d 659, 660-61 (4th Cir. 1986).

9. The class is therefore entitled to damages, attorneys fees and costs under 29 *U.S.C.* § 1132(g) as to Counts I and II (ERISA).

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO DAMAGES

The plaintiffs' expert on damages was Ralph Sayre, an actuary who specializes in administration and valuation of pension plans. Mr. Sayre testified that he had been furnished appropriate payroll records of Tru-Tech together with the interest rates the pension funds would have earned had they been properly invested with Connecticut General. According to Mr. Sayre's report [Plaintiffs' Exhibit #25] the class members would be entitled to damages in the amount of $205,407.20 as of December 31, 1987. A copy of Mr. Sayre's schedule of damages is attached as Exhibit A. Mr. Sayre's report reflects that all participants in the pension plan were terminated after Tru-Tech went out of business during the 1984 plan year. He testified that due to the large number of terminated employees, he treated the plan as having a "partial termination" which results in all employees being 100% vested. This treatment is consistent wtih § 15.5 of the plan [Plaintiffs' Exhibit #13] which provides that upon a "partial termination" of the plan all participants shall be 100% vested and entitled to a distribution of their account.

Based on the above, I make the following findings of fact regarding damages:

1. All class participants as reflected on Exhibit A are 100% vested in their account balances.

2. The schedule of class participants account balances as reflected on Exhibit A in the amount of $205,407.20 is the amount of damages the class is entitled to as of December 31, 1987 and it also correctly reflects the damages recoverable by each member of the class.

3. The defendants are also liable for pre-judgment interest from December 31, 1987. The *52 Week T-Bill Rate Changes, January 1, 1975 to Date*, issued by the Administrative Office of the United States Courts reflect that the rate on January 14, 1988 was 7.14%. Applying this rate to the damages of $205,407.20 from January 1 through October 30, 1988, yields $12,221.73 of applicable pre-judgment interest, thereby entitling the class participants to a total sum of $217,628.93. Prior to trial, the plaintiffs settled with the defendant Connecticut General for the sum of $30,000.00, which has previously been approved by the court. Accordingly, Tru-Tech is liable for the sum of $187,628.93.

4. 29 *U.S.C.* Section 1132(g) provides for reasonable attorneys fees and costs. I find that plaintiffs are entitled to reasonable attorneys fees and costs. The attorneys for the plaintiff class shall submit their petition for attorneys fees and costs within 45 days of the date of this order.

Based on the above, the Clerk of Court shall enter judgment against the defendant Tru-Tech, Inc. in the amount of $187,628.93. The plaintiff shall have no judgment against the defendant D. Grant Peacock and D. Grant Peacock & Co.

IT IS SO ORDERED.

/s/ G. Ross Anderson, Jr.
G. Ross Anderson, Jr.
United States District Judge

Anderson, South Carolina

Nov. 28, 1988.

EXHIBIT A

	Last Name	First Name	Soc. Sec. #	Total Account	Vested Percentage	Vested Benefit
1	ALLEN	F. L.	034-22-5455	747.25	100%	747.25
2	ALLEN	JASPER E.	249-78-4126	4,631.56	100%	4,631.56
3	BERG	W.		0.00	100%	0.00
4	BLACKBURN	JOHN H.	024-32-3447	20,302.49	100%	20,302.49
5	BRITT	RONALD	249-96-5942	479.21	100%	479.21
6	BURZYSKI	MARK	059-46-6121	1,730.05	100%	1,730.05
7	CANTERBURY	JOHN D.	235-42-5105	5,772.19	100%	5,772.19
8	CAPPS	JERALDINE	250-64-5599	2,944.63	100%	2,944.63
9	CATOE	BRUCE	249-76-4858	1,980.34	100%	1,980.34
10	CLARK	V.		0.00	100%	0.00
11	COLCORD	WALLACE	013-24-5574	7,348.69	100%	7,348.69
12	COLLINS	CLYDE	247-64-8262	7,523.95	100%	7,523.95
13	COLLINS	J. M.	247-90-8241	2,989.24	100%	2,989.24
14	COLLINS	LUNNETTE	247-66-5871	2,477.87	100%	2,477.87
15	DEW	JAMES E.	250-62-0426	1,445.04	100%	1,445.04
16	DICKERSON	JEROME	249-86-7935	4,416.61	100%	4,416.61
17	DALE	CHRISTINE I.	492-22-1158	3,302.36	100%	3,302.36
18	DOOLAN	DAVID W.	003-30-7544	6,155.78	100%	6,155.78
19	ELMORE	JOHN C.	249-66-4987	1,508.50	100%	1,508.50
20	ELVIS	GEROY	247-66-8833	5,289.88	100%	5,289.88
21	ERVIN	FARRIS, JR.	238-34-7357	1,931.13	100%	1,931.13
22	FORTNER	SHELBY	248-74-5495	1,060.27	100%	1,060.27
23	GERALD	BETTY B.	248-68-1302	2,171.91	100%	2,171.91
24	GILPATRICK	D. M.	001-38-4776	0.00	100%	0.00
25	GILPATRICK	L.		0.00	100%	0.00

26	GROSS	ARTHUR L.	003-14-9144	3,453.05	100%	3,453.05
27	HARDEE	EDNA	249-68-8227	2,157.13	100%	2,157.13
28	HERLONG	ALICE P.	251-82-0429	2,809.32	100%	2,809.32
29	HERLONG	HAROLD B.	247-74-3454	4,867.75	100%	4,867.75
30	HOOKS	BRENDA	251-82-0104	2,278.53	100%	2,278.53
31	HULON	BARBARA C.	248-74-1502	5,076.48	100%	5,076.48
32	HUMPHRIES	MILDRED W.	250-32-7265	381.49	100%	381.49
33	HURD	B. J.	230-20-4956	3,787.36	100%	3,787.36
34	HUSKEY	MARTHA A.	250-68-7147	3,409.30	100%	3,409.30
35	JOHNSON	BETTY H.	250-64-6417	1,900.25	100%	1,900.25
36	JOHNSON	MARJORIE	250-52-5727	536.93	100%	536.93
37	KAZAN	THEODORE S.	037-26-0205	4,579.05	100%	4,579.05
38	KENNEDY	ROBERT D.	021-36-6850	4,499.19	100%	4,499.19
39	KUZDEBA	RAYMOND J.	039-30-2741	10,504.07	100%	10,504.07
40	LANE	GLENN O.	048-44-3439	4,768.37	100%	4,768.37
41	MARDIN	RICHARD E.	003-28-9271	3,217.07	100%	3,217.07
42	McBRIDE	ROGER A.	002-16-2531	0.00	100%	0.00
43	McKEKING	ALVIN		0.00	100%	0.00
44	McKENZIE	DAYTON E.	248-56-2699	0.00	100%	0.00
45	McKENZIE	DENNIS R.	003-26-4464	4,000.62	100%	4,000.62
46	McKINNON	DEAN G.	001-38-4805	3,813.09	100%	3,813.09
47	MILTON	BERNARD L.	003-22-2970	1,314.01	100%	1,314.01
48	MYERS	B. J.	241-70-5412	3,336.70	100%	3,336.70
49	PERKINS	DEAN G.	024-30-9025	0.00	100%	0.00
50	PRINCE	LOLA	251-30-4385	2,450.64	100%	2,450.64
51	PULLEY	ROGER	250-63-7339	4,918.10	100%	4,918.10
52	ROGERS	A. G.	249-56-3498	1,481.20	100%	1,481.20
53	ROGERS	JERRY	248-62-4982	2,929.12	100%	2,929.12
54	SANDERS	H. T.	421-58-0324	4,345.28	100%	4,345.28

	Last Name	First Name	Soc. Sec. #	Total Account	Vested Percentage	Vested Benefit
55	SAVELLI	JOHN N.	019-20-7115	6,479.14	100%	6,479.14
56	SEIFERT	RICHARD	379-24-0326	2,210.27	100%	2,210.27
57	SHAUGHNESSY	STEPHEN	003-40-7962	4,570.54	100%	4,570.54
58	THOMAS	JACK L.	239-34-4694	15,120.95	100%	15,120.95
59	THOMAS	MILES	249-09-7211	3,595.91	100%	3,595.91
60	THOMPSON	GREGORY	002-42-7972	0.00	100%	0.00
61	THOMPSON	SANDRA L.	251-92-8998	1,004.10	100%	1,004.10
62	TOBINE	KATHRYN G.	002-46-7915	1,980.25	100%	1,980.25
63	UHLMAN	LEROY P.	003-28-5058	5,025.91	100%	5,025.91
64	VERNER	KINSEY	247-02-0827	0.00	100%	0.00
65	WEBSTER	WALTER	340-42-0464	4,472.53	100%	4,472.53
66	WEST	VIVIAN	250-62-9734	2,166.40	100%	2,166.40
67	WHITE	LAURA H.	251-48-6187	6,415.92	100%	6,415.92
68	WILCOCK	B. W.	562-56-2443	16,146.45	100%	16,146.45
69	YELTON	BARRY	238-74-4290	0.00	100%	0.00
70	ZWICKER	THOMAS J.	002-42-5069	2,372.28	100%	2,372.28
				244,584.00		244,583.71

DEDUCTION FOR

F.L. ALLEN	747.25
J. H. BLACKBURN	20,302.49
B. CATOE	1,980.34
B. W. WILCOCK	16,146.45
TOTAL	39,176.52

NET 205,407.20

(AS OF 12/31/87)

/s/ Ralph J. Sayre
RALPH J. SAYRE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2001

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Inc., Pension Plan, and as Representative of Class of Plaintiffs Similarly Situated,

Plaintiff-Appellant,

versus

TRU-TECH, INC.; D. GRANT PEACOCK; GRANT PEACOCK AND COMPANY, INC.,

Defendants-Appellees,

and

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Defendant.

No. 89-2003

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Inc., Pension Plan, and as Representative of Class of Plaintiffs Similarly Situated,

Plaintiff-Appellee,

versus

TRU-TECH, INC.,

Defendant-Appellant,

and

D. GRANT PEACOCK, GRANT PEACOCK AND COMPANY, INC.; CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Defendants.

Appeals from the United States District Court
for the District of South Carolina, at Spartanburg.
G. Ross Anderson, Jr., District Judge. (CA-87-2243-3)

Argued: January 10, 1990 Decided: April 3, 1990

Before RUSSELL and CHAPMAN, Circuit Judges, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

CHAPMAN, Circuit Judge:

This appeal arises out of a class action brought by Jack L. Thomas ("Thomas") against Tru-Tech, Inc. ("Tru-Tech"), D. Grant Peacock ("Peacock"), Grant Peacock and Co. Inc. ("GP&C") and Connecticut General Life Insurance Company ("CGLIC") alleging, *inter alia*, breach of fiduciary duty under the Employment [*sic*] Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* (1989) ("ERISA"). The district court, following a trial to the bench, held Tru-Tech liable for breach of fiduciary duty, but found that Peacock and GP&C were not fiduciaries under the Plan and thus could not be liable for breach of fiduciary duty. Thomas appeals, arguing that the district court erred in finding that Peacock and GP&C were not fiduciaries. Tru-Tech appeals, arguing that the district court erred in finding that the amend-

ment to the Plan was authorized by Tru-Tech's Board of Directors and that Tru-Tech's Plan was approved by the IRS. We conclude that the district court did not clearly err as to its findings of fact and made no errors of law.

I

Located in Spartanburg, South Carolina, Tru-Tech was formed in 1981 to take over a textile machinery business previously operated by Rockwell International Corporation. Tru-Tech's Chairman of the Board was Peacock, who also owned and operated GP&C, a Pittsburgh company that was initially a business brokerage business and later a company managing other business interests of Peacock and his business associates. Tru-Tech shared offices in Pittsburgh with GP&C.

In a resolution of the Board of Directors dated December 4, 1981, Tru-Tech adopted a pension plan for its salaried workers ("Plan"). This Plan provided for ten-year "cliff" vesting under which an employee would become fully vested following ten years of service. The Board did not discuss or specify the "cliff" vesting schedule, but gave its general approval of the Plan. Although it stated an effective date of October 1, 1981, the adoption of the Plan was "subject to the condition precedent that the Plan shall be approved and qualified by the Internal Revenue Service." The Board of Directors also resolved that "such executive officers are hereby authorized to make such technical or administrative amendments to the Plans . . . as they in their discretion deem advisable or as may be requested by the Internal Revenue Service or other governmental authorities."

The adoption agreement was subsequently executed on December 29, 1981, by Bill Wilcock, President of Tru-Tech. However, Tru-Tech did not submit the Plan to the IRS for approval until December 31, 1982, and the IRS informed Tru-Tech on July 21, 1983, that the cliff vesting schedule was not acceptable and that a vesting

period at least as liberal as a 4-40 vesting schedule was required; under such schedule, covered employees would become 40% vested after four years and 100% vested after eleven years. Wilcock and B. J. Myers, Assistant Secretary of Tru-Tech, executed an amendment to the Plan on September 14, 1983, in which a 4-40 vesting schedule was adopted. The IRS's records indicate that this "amendment to the plan was approved on 5/30/84 as a National Office Technical Advice Memorandum." The amendment, while not approved by the Board, was prepared by Tru-Tech's insurance agent and approved by Tru-Tech's counsel.

Meanwhile, Tru-Tech had serious financial problems because of continuing operating losses and obtained a funding waiver, allowing it to stop funding the Plan. Peacock testified that the declining business situation led to conflict between Wilcock and the Board, resulting in his resignation within weeks of the amendment to the Plan. At that point, T. H. Williams, who was Vice President of GP&C, became Executive Vice President of Tru-Tech. Unaware of the amendment made by Wilcock and Myers, Williams notified the Board of the IRS's rejection of the cliff vesting schedule. The Board decided against any change in the Plan and resolved on April 17, 1984, that the Plan "will be terminated and replaced with a profit sharing plan." After discovering the existence of the amendment, Williams wrote the IRS in July, August, and October of 1984, advising that the amendment was not approved by the Board and requesting an adverse determination. The IRS issued its proposed adverse determination on January 31, 1985, which, since no appeal was taken, became final on May 23, 1985. As a result, the Plan was terminated and its assets were refunded to Tru-Tech with interest.

Thomas brought this class action on August 24, 1987. After a one-day bench trial, the district court held on August 31, 1988, that Tru-Tech had breached its fiduciary

duty under the Plan and ERISA and awarded the plaintiffs $187,628.93 and attorney's fees. In particular, the district court found that Tru-Tech's amended Plan was approved and qualified by the IRS and that Tru-Tech's attempt to revert to the cliff vesting schedule was done to bring about a termination of the Plan and a return of its funds. However, the court held that Peacock and GP&C were not fiduciaries under the Plan and could not be liable for breach of fiduciary duty.

II

Thomas argues that the district court clearly erred in finding that neither Peacock nor GP&C were liable as fiduciaries under ERISA. The Act allows suits for breach of fiduciary duty only against persons who are fiduciaries. 29 U.S.C. § 1109(a) (1989); *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324-25 (9th Cir. 1985). To identify a fiduciary, one looks first to the terms of the plan, which must "provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1). *See also* ERISA Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8 (1983) ("Each plan must, of course, have at least one named fiduciary . . . ."). If a plan designates a person or entity a "named fiduciary," then such person or entity is presumptively a fiduciary and subject to liability under ERISA. *See Yeseta v. Baima*, 837 F.2d 380, 384 (9th Cir. 1988). In this case, Paragraph 1.26 of the Plan states that the term "named fiduciary" means "the Administrator and any other Fiduciary designated by the employer in its adoption agreement and any successor thereto." The Adoption Agreement designated Tru-Tech as the administrator and named fiduciary, and Tru-Tech subsequently appointed W. A. Williams as Plan Administrator at its December 4, 1981, board meeting. Thus, neither Peacock nor GP&C are fiduciaries within the express terms of the Plan.

However, analysis does not stop here. The Act extends the scope of the term "fiduciary" to those who actually exercise discretionary authority, control or responsibility over a plan. Section 1002(21)(A) defines a fiduciary as follows:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). The phrase "to the extent" indicates that "in defining 'fiduciary' Congress was peculiarly concerned with realities, as distinguished from mere formalities." *Fulk v. Bagley*, 88 F.R.D. 153, 162 ((M.D.N.C. 1980). We must focus "on the function performed, rather than on the title held." *Blatt v. Marshall and Lassman*, 812 F.2d 810, 812 (2d Cir. 1987). *See also* H.R. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 5038, 5103 ("[T]he definition includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title.").

As a result of this pragmatic inquiry, a person not designated as a fiduciary by a plan may yet be a fiduciary under ERISA if that person exercises powers listed in Section 1002(21)(A). However, an officer or director of a corporation is not a fiduciary merely because of his or her position in the corporation, as an interpretive bulletin issued by the Labor Department explains. This bulletin reads in pertinent part:

> D-4 Q: In the case of a plan established and maintained by an employer, are members of the board of directors of the employer fiduciaries with respect to the plan?

A: Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in section [1002](21)(A) of the Act.

* * *

D-5 Q: Is an officer or employee of an employer or employee organization which sponsors an employee benefit plan a fiduciary with respect to the plan solely by reason of holding such office or employment if he or she performs none of the functions described in Section [1002](21)(A) of the Act?

A: No.

ERISA Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8 (1983). But an officer or director actually exercising fiduciary, rather than corporate, powers is subject to ERISA liability as a fiduciary. *See, e.g., Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1522 (11th Cir. 1985) (where court held that the corporate executive, who was "acting as a fiduciary," was liable "whatever his title, or whether he was named as a fiduciary or not . . . .").

Thomas argues that Peacock, although not designated a fiduciary, exercised fiduciary power by allegedly executing the ten-year cliff vesting amendment which led to the termination of the Plan.[1] However, the district court held that Peacock acted solely in his capacity as Chairman of the Board of Tru-Tech, not as a fiduciary of the Plan. Indeed, the record reveals that Tru-Tech's Board of Directors resolved in a meeting on October 11, 1984, to retain the ten-year cliff vesting schedule. Conceding this,

[1] Thomas also argues that Peacock exercised fiduciary power by misrepresenting to the IRS that the 4-40 vesting schedule amendment lacked proper approval of Tru-Tech's Board of Directors. However, the district court found that T. H. Williams, not Peacock, made this statement, whether or not a misrepresentation, in his correspondence with the IRS in the latter half of 1984.

Thomas insists that Peacock, as the principal investor, dominated the Board and had de facto power to make these decisions concerning the Plan. But this influence has scant evidentiary support and does not contradict the finding that these decisions were made by the Board, not Peacock acting unilaterally. Thus, Thomas fails to demonstrate that the district court clearly erred in finding that Peacock did not possess sufficient discretionary authority and control over the Plan to make him a fiduciary.

Regarding the status of GP&C as an ERISA fiduciary, the district court held that "[w]hile Tru-Tech shared offies in Pittsburgh with [GP&C] and certain individuals were officers of both companies, there is no suggestion that [GP&C] exercised any authority or control in connection with the Tru-Tech salaried pension plan or for that matter, any of the affairs of Tru-Tech." Thomas failed to give any evidence linking GP&C with Tru-Tech's decision to adopt the ten-year cliff vesting schedule or with any affairs of Tru-Tech, other than the fact that both Peacock and Williams were officers of GP&C, and the district court did not err in finding this unpersuasive.[2]

II.

The district court held that Tru-Tech's attempt to change from the 4-40 vesting schedule to the less favorable ten-year cliff vesting schedule violated not only Paragraph 15.3 of the Plan,[3] but also 29 U.S.C. § 1053(c), which

[2] Alternatively, Thomas argues that even if Peacock and GP&C are not fiduciaries, "they are liable as nonfiduciaries who knowingly participated in the fiduciary's breach of duty." Since this argument was not raised before the district court, we decline to consider it on appeal. *Farish v. Courion Industries, Inc.*, 754 F.2d 1111, 1118 (4th Cir. 1985) ("[We] will not, in the absence of clear error, consider issues not raised in the court below").

[3] Paragraph 15.3 of the Plan provides as follows:

CONDITIONS OF AMENDMENT: Neither the Sponsor nor Employer shall make any amendment which would cause the Plan to lose its status as a qualified plan within the meaning of § 401(a) of the Internal Revenue Code.

states that once a vesting schedule becomes effective, it cannot be changed to a less favorable vesting schedule.[4] In its cross-appeal, Tru-Tech argues that two of the district court's factual findings underlying this holding are erroneous: (a) that Wilcock and Myers had the authority to execute the 4-40 vesting schedule amendment and thereby bind Tru-Tech (Findings of Fact ##5, 6 & 7); and (b) that the IRS approved the 4-40 vesting schedule (Finding of Fact #8).

A. The Validity of the 4-40 Amendment

The district court found as a matter of fact that the amendment by Wilcock and Myers changing the Plan from the ten-year cliff vesting schedule to the 4-40 schedule was valid because they had the actual and apparent authority to make such an amendment. At a meeting on December 4, 1981, Tru-Tech's Board resolved that its executive officers, including Wilcock and Myers, were

> authorized to make such technical and administrative amendments to the Plans . . . as they in their discretion deem advisable *or* as may be requested by the Internal Revenue Service or other governmental bodies.

(Emphasis added.) Finding that the 4-40 vesting schedule amendment was technical in that "the vast majority of the key employees . . . would have been vested under either schedule," the court held that the amendment was a valid exercise of Wilcock's and Myers' authority. Tru-Tech argues that the 4-40 amendment was clearly substantive in nature because "[w]hile approximately 50% of the employees were fully vested under the ten year cliff vesting provided in the Plan as originally adopted, some 80% of the employees would have already achieved vesting at the 40% level at the time they entered employment at Tru-Tech." Although Tru-Tech's statistical formulation provides another way of looking at the amendment, it does not directly contradict the district court's own analysis. We find persuasive the fact that this amendment was requested by the IRS, and Wilcock and Myers were merely complying with the aforementioned Board resolution in going along with an IRS request. Therefore, we cannot say that this finding was clearly erroneous.

[4] Section 1053(c)(a)(A) states in part:

> A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) of this section if the nonforfeitable percentage of the accrued benefit derived from employer contributions . . . of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.

B. IRS Approval

The second finding crucial to the district court's holding is whether the 4-40 vesting schedule amendment resulted in the Plan becoming effective. In addressing this issue, the district court looked to Paragraph 15.7 of the Plan, which covers approval by the Internal Revenue Service:

> Notwithstanding any other provisions of this Plan, the Employer's adoption of this Plan is subject to the condition precedent that the Employer's Plan shall be approved and qualified by the Internal Revenue Service as meeting the requirements of section 401(a) of the Internal Revenue Code.

The district court found that "[f]ollowing the adoption of the 4-40 vesting schedule the plan did, in fact, meet the requirements of § 401(a) of the Internal Revenue Code and was, in fact, approved and qualified by the [IRS]."

This finding is not clearly erroneous. In the IRS' proposed adverse determination letter to Tru-Tech, apparently dated January 31, 1985, the IRS indicated that it had previously approved the 4-40 vesting schedule amendment:

> The waiver of minimum funding and the amendment to the plan was approved on May 30, 1984 as a National Office Technical Advice Memorandum. The file was subsequently returned to the Atlanta Key District EP/EO Division for consideration of the response by the National Office in their Technical Advice Memorandum.

In its letter to the IRS dated July 23, 1984, T.H. Williams, Executive Vice President of Tru-Tech, said that the "IRS subsequently approved the plan." Tru-Tech contends that this approval was preliminary, not final, because the IRS rejected the Plan in the very same letter. Yet Tru-Tech provides no argument as to why this approval, even if preliminary, did not satisfy the requirements of Paragraph 15.7 of the Plan, as the district court held. Indeed, nothing in Paragraph 15.7 dictates that the IRS' approval be written or final. Tru-Tech also points out that Williams testified that his statement that the IRS had approved the Plan was erroneous. However, we see no reason to disturb the district court's implicit rejection of the credibility of this testimony.

III

For the above reasons, we affirm the judgment of the district court.

AFFIRMED

[Filed Feb. 7, 1992]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Case Number: 7:91-3843-3

JACK L. THOMAS, Individually, or behalf of the Tru-Tech, Inc. Pension Plan, and as a Representative of a Class of Plaintiffs similarly situated,

v.

D. GRANT PEACOCK and ALAN H. FINEGOLD.

FIRST AMENDED SUMMONS
IN A CIVIL ACTION

TO: DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon plaintiff's attorney

J. Kendall Few
850 Wade Hampton Boulevard
Post Office Box 10085
Greenville, SC 29603

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ Ann A. Birch
Clerk

Date Feb. 7, 1992

/s/ Kathy Tisdale
By Deputy Clerk

[Filed Feb. 7, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

C/A No: 7:91-3843-3

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Inc. Pension Plan, and as a Representative of a Class of Plaintiffs Similarly Situated,
Plaintiffs,

vs.

D. GRANT PEACOCK and ALAN H. FINEGOLD,
Defendants.

FIRST AMENDED COMPLAINT

1. Plaintiff is a resident of the Spartanburg Division.

2. Tru-Tech, Inc. is a Delaware corporation doing business in the Spartanburg Division.

3. D. Grant Peacock is a resident of Pennsylvania who formerly served as Chief Executive Officer and controlling shareholder of Tru-Tech, Inc.

4. Alan H. Finegold is a resident of Pennsylvania and a partner in the law firm of Kirkpatrick & Lockhart, Attorneys at Law, of Pittsburgh, Pennsylvania.

FOR A FIRST CAUSE OF ACTION

(Civil Conspiracy and Fraudulent Transfer)

5. On August 20, 1987, Plaintiffs filed an action against Tru-Tech, Inc., D. Grant Peacock, Grant Peacock & Co., Inc., and others in this Court, C/A #: 7:87-2243-3. This complaint alleged a cause of action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* for breach of fiduciary duty in the administration of the Tru-Tech, Inc. Pension Plan. This action was certified as a class action and, in November of 1988, the class obtained a judgment against Tru-Tech, Inc. for $187,500, which remains unsatisfied.

6. At or about the time of the entry of this judgment, D. Grant Peacock and others entered into a civil conspiracy, the purpose and effect of which was to make fraudulent and preferential transfers of assets from Tru-Tech, Inc. in order to defeat Plaintiffs' claims as judgment creditors.

7. The same considerations that warranted class certification in C/A No. 7:87-2243-3 exist in this action. That is, Plaintiff Thomas is a former employee of Tru-Tech, Inc. and a beneficiary of the Tru-Tech, Inc. Pension Plan. This action is brought individually, on behalf of the Tru-Tech, Inc. Pension Plan, and as a class action on behalf of all other former employees of Tru-Tech, Inc., who are beneficiaries of the Tru-Tech, Inc. Pension Plan to collect their judgment on the following grounds:

(a) The Class is so numerous that joinder of all members is impracticable;

(b) There are questions of law and fact common to the Class;

(c) The claims of the Plaintiff are typical to the claims of the Class;

(d) The Representative Plaintiff will fairly and adequately protect the interests of the Class;

(e) Common questions of law and fact predominate over individual issues.

8. During the period following the entry of this judgment, Alan H. Finegold, as a partner of Kirkpatrick & Lockhart, represented and advised D. Grant Peacock and

Grant Peacock & Co., Inc., in connection with this judgment. Beginning in or before March of 1989, Alan H. Finegold entered into the civil conspiracy alleged in ¶ 6 above, the purpose and effect of which was to make fraudulent and preferential transfers of assets from Tru-Tech, Inc. in order to defeat Plaintiffs' claims as judgment creditors.

9. Pursuant to this conspiracy, D. Grant Peacock and Alan H. Finegold committed certain specific acts, unlawful in nature and illegal in purpose, the specific intent of which was to damage the rights of the Plaintiff Class as judgment creditors. The specific acts done pursuant to this civil conspiracy included the following:

(a) On or about December 13, 1988, Tru-Tech, Inc. received $107,500 as the proceeds of settlement of separate litigation pending in South Carolina. The co-conspirators undertook to divert these proceeds to make fraudulent and preferential transfers of assets from Tru-Tech, Inc. to defeat the claims of the Plaintiff Class as judgment creditors.

(b) In or before March of 1989, Alan H. Finegold wrote to D. Grant Peacock, advising him to cause Tru-Tech, Inc. to dispose of certain real estate owned by Tru-Tech, Inc. in New Hampshire before the Plaintiffs could attempt to levy upon it. He advised the continuation of payment of legal fees to Tru-Tech, Inc.'s counsel in C/A No. 7:87-2243-3 in order to keep them involved in the appeal process and suggested ways to set up a new corporation in order to transfer assets out of Tru-Tech, Inc.'s name.

(c) Between March 2 and March 13, 1989, D. Grant Peacock and Alan H. Finegold met together with co-conspirator Jack Blackburn to develop and refine a strategy to defeat the claims of the Plaintiff Class.

(d) On or about March 13, 1989, Alan H. Finegold wrote to D. Grant Peacock setting forth various matters which had been settled upon pursuant to such strategy in order to defeat the rights of the Plaintiff Class, including the following:

i. It was agreed that Tru-Tech, Inc. would proceed to pay with its available cash the legal fees owed to attorneys still active on its behalf, including attorneys involved in the appeal of the judgment in C/A No. 7:87-2243-3 and the firm of Kirkpatrick & Lockhart whose purpose it was to assist in defeating the claims of the Plaintiff Class.

ii. That Tru-Tech, Inc. would refrain from the payment "of any obligations arising out of the *Thomas* litigation" so as to defeat the legitimate judgment obtained by the Plaintiff Class.

iii. Tru-Tech, Inc. would use its assets to make preferential payments to D. Grant Peacock and/or companies owned or controlled by him "in order to start running the one year period for avoidance of preferences to control persons in bankruptcy."

iv. That certain assets of Tru-Tech, Inc. including "the Uhlman note and the Brodsky note" would be transferred to certain "favored creditors", including D. Grant Peacock and/or corporations owned or controlled by him.

(e) On or about April 3, 1989, Alan H. Finegold and D. Grant Peacock combined and conspired together to transfer the Uhlman note and the proceeds from the sale of such note to "some favored creditors like Peacock, Williams & Company, Incorporated."

10. Various other acts were undertaken by these co-conspirators, the purpose and effect of which was to make

fraudulent and preferential transfers to certain preferred creditors in order to defeat the Plaintiffs' lawful claims as judgment creditors, as a result of which, Tru-Tech, Inc. was rendered insolvent and collection of Plaintiffs' judgment was prevented.

11. It was the actual and specific intention of these co-conspirators to injure the Plaintiff Class and their overt actions were specifically directed to that end so as to specifically prevent collection of Plaintiffs' judgment.

12. Pursuant to such plan and conspiracy, the co-conspirators caused and directed the appropriate officers of Tru-Tech, Inc. to make specific transfers of assets to preferred creditors and to squander and waste the assets of the corporation so as to specifically prevent collection of Plaintiffs' judgment.

13. The conveyances and transfers made pursuant to this conspiracy were fraudulent, preferential and unlawful pursuant to the public policy of the states of South Carolina, Pennsylvania and New Hampshire, including Title 27, Chapter 23, of the *South Carolina Code*, the Pennsylvania Uniform Fraudulent Conveyances Act and the New Hampshire Uniform Fraudulent Transfer Act. Specifically, these payments constituted transfers made with actual intent to defraud creditors, in violation of § 7 of the Uniform Fraudulent Conveyance Act, as preferential transfers to insiders with reasonable cause to believe that the debtor was insolvent pursuant to § 5(b) of the New Hampshire Uniform Fraudulent Transfer Act, and as conveyances to defraud and deceive creditors pursuant to § 27-23-10 and 20 of the *South Carolina Code*. In addition, these transfers and conveyances were unlawful under the applicable corporate law of the states of South Carolina, Pennsylvania and New Hampshire as payments by an insolvent corporation to officers-insider-creditors presumed to be unfair and in contravention of the officer's fiduciary duty to protect the interests of general creditors

under *Robar Development Corp. v. Minutello,* 408 A.2d 851 (Pa. Sup. Ct. 1979) and other applicable authority.

14. It was the motive and purpose of the co-conspirators to injure Plaintiffs and to hinder, delay and defraud them of their legitimate claims as judgment creditors.

15. On information and belief, the actions of D. Grant Peacock and Alan H. Finegold were intended to and did in fact enure [*sic*] to their own financial benefits because:

(a) They resulted in preferential payments to D. Grant Peacock and/or corporations owned or controlled by him.

(b) They resulted in payments for legal services and a continuation and enlargement of legal business for Alan H. Finegold and Kirkpatrick & Lockhart.

16. The co-conspirators were aware of and knowingly subscribed to the common purposes of this civil conspiracy and knowingly accepted its implications and benefits.

17. The damages to the Class proximately resulted from overt acts of Peacock, Finegold and their co-conspirators performed pursuant to such civil conspiracy.

FOR A SECOND CAUSE OF ACTION

(Piercing the Corporate Veil Under ERISA and Applicable Federal Law)

18. Paragraphs 1-17 are incorporated herein by reference.

19. Defendant Peacock is individually liable for the judgment in C/A No. 7:87-2243-3 because, as Chief Executive Officer and controlling shareholder of Tru-Tech, Inc., he assumed control over Tru-Tech, Inc. to such an extent that the company was a mere "alter ego" or

"instrumentality" of Peacock based on one or more of the following specific allegations:

(a) Tru-Tech, Inc. was inadequate [*sic*] capitalized either at incorporation or during the corporation's existence or dissolution;

(b) Tru-Tech, Inc. failed to observe corporate formalities;

(c) Tru-Tech, Inc. failed to pay dividends;

(d) Tru-Tech, Inc. was insolvent at the time payments were made to shareholders;

(e) Funds of the corporation were siphoned by the dominate [*sic*] shareholder(s);

(f) The officers or directors did not function in a responsible or independent manner;

(g) Absence of corporate records;

(h) The fact that the corporation was merely a facade for the operations of the dominate stockholder or stockholders;

(i) The extreme injustice imposed on Plaintiff's class if Defendant Peacock were allowed to milk assets from Tru-Tech, Inc. knowing of the company's liability or potential liability to Plaintiff's class.

20. As a result of such civil conspiracy and overt acts performed pursuant thereto, together with the other allegations in this Complaint, Plaintiffs suffered actual damages as follows:

(a) Inability to collect the legitimate judgment against Tru-Tech, Inc.;

(b) Related costs and legal expenses;

(c) Loss of post judgment interest on the prior judgment and prejudgment interest on the damages in this action.

WHEREFORE, Plaintiffs seek actual and punitive damages and such other relief as may be appropriate.

J. KENDALL FEW
JAMES R. GILREATH

By: /s/ J. Kendall Few
Attorneys for Plaintiffs

Greenville, South Carolina

Feb. 7, 1992

[Certificate of Service Omitted in Printing]

[Filed Mar. 3, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Civil Action No. 7-91-3843-3

JACK L. THOMAS, Individually, on Behalf of the Tru-Tech, Inc., Pension Plan, and as a Representative of a Class of Plaintiffs Similarly Situated,

Plaintiff,

vs.

D. GRANT PEACOCK and ALAN H. FINEGOLD,

Defendants.

ANSWER

Defendant D. Grant Peacock, answering the First Amended Complaint of the Plaintiff, would respectfully show unto the Court:

FOR A FIRST DEFENSE

1. Defendant lacks information sufficient to form an opinion or belief as to the truth or falsity of the allegations of Paragraph 1 of the First Amended Complaint, and therefore denies the same.

2. As to the allegations of Paragraph 2 of the First Amended Complaint, Defendant admits that Tru-Tech is a Delaware corporation. Defendant denies that Tru-Tech is doing business in the Spartanburg division.

3. As to the allegations of Paragraph 3 of the First Amended Complaint Defendant admits that he is a resident of Pennsylvania. Defendant denies he has ever held

the position or title of Chief Executive Officer of Tru-Tech, Inc. Defendant objects to the remaining allegations of Paragraph 3 of the First Amended Complaint as ambiguous and as calling for a legal conclusion.

4. Defendant admits the allegations of Paragraph 4 of the First Amended Complaint.

5. Defendant would show that the judgment against Tru-Tech, Inc. in the lawsuit referred to in Paragraph 5 of the First Amendment Complaint was in the amount of $187,628.93. Defendant is without knowledge of the specific date on which the lawsuit was filed, but would show that the Summons and Complaint in the lawsuit were mailed to defendant on or about August 24, 1987. Defendant admits the other allegations of Paragraph 5 of the First Amended Complaint.

6. Defendant denies the allegations of Paragraph 6 of the First Amendment Complaint, and specifically denies the existence of and his participation in any conspiracy and any and all allegations of fraud.

7. As to the allegations of Paragraph 7 of the First Amended Complaint, Defendant admits that Plaintiff is a former employee of Tru-Tech, Inc. and a beneficiary of the Tru-Tech, Inc. Pension Plan. Defendant denies the remaining allegations of Paragraph 7 of the First Amended Complaint.

8. Defendant denies the allegations of Paragraph 8 of the First Amended Complaint. Defendant repeats his specific denials of Paragraph 6 of this Answer.

9. As to the allegations of Paragraph 9 of the First Amended Complaint, Defendant denies the existence of any conspiracy and denies that he committed any acts pursuant to any conspiracy. Defendant further denies that he committed any unlawful acts, had or formed any illegal purpose, or had the intent of damaging the alleged rights of Plaintiff or those whom he purports to represent.

(a) Defendant admits that Tru-Tech, Inc. received proceeds of a settlement, on or about the date alleged, in separate litigation in South Carolina. Defendant is without information as to the amount of proceeds received by Tru-Tech, Inc., and so denies that the amount was $107,500. Defendant denies the remaining allegations of Paragraph 9(a) of the First Amended Complaint.

(b) Defendant admits the allegations of the first sentence of paragraph 9(b) of the First Amended Complaint. Defendant also admits that Alan H. Finegold advised that Tru-Tech, Inc. continue to pay the legal fees of counsel in C.A. No. 7:87-2243-3. Defendant admits that Mr. Finegold suggested the alternative of formation of a corporation to purchase certain assets from Tru-Tech, Inc. for full value; however, this suggestion was never carried out.

(c) As to the allegations of Paragraph 9(c) of the First Amended Complaint, Defendant admits that he met with Alan Finegold, and that the two of them spoke by telephone with Jack Blackburn, during the period alleged. Defendant denies that there was a conspiracy and denies that Jack Blackburn was a co-conspirator. Defendant denies that he was in any way involved with or aware of any strategy to defeat the alleged claims of Plaintiff or those whom he purports to represent.

(d) As to the allegations of Paragraph 9(d) of the First Amended Complaint, Defendant admits that Alan Finegold wrote to Defendant on or about March 13, 1989. Defendant reiterates his denial of any purpose of defeating the alleged claims of Plaintiff or those whom he purports to represent.

(i) Defendant admits that Mr. Finegold's letter recited that Tru-Tech would continue to pay attorneys still active on its behalf. Defendant denies all other allegations of Paragraph 9(d)(i) of the First Amended Complaint.

(ii) Defendant admits that Mr. Finegold's letter recited that Tru-Tech would not at that time make payments on the judgment in C.A. No. 7:87-2243-3, which was at that time pending appeal.

(iii) Defendant admits that Mr. Finegold's letter recited that Tru-Tech would pay bona fide debts owed to Defendant and to Peacock Williams & Co. Defendant denies the remaining allegations of Paragraph 9(d)(iii) of the First Amended Complaint.

(iv) Defendant denies the allegations of Paragraph 9(d)(iv) of the First Amended Complaint.

(e) As to the allegations of Paragraph 9(e) of the First Amended Complaint, Defendant admits that the so-called "Brodsky Note" was transferred by Tru-Tech for valid consideration, and admits that Tru-Tech sold a note made by L. Parker Uhlman and Carolyn Anne Uhlman for cash. Defendant denies the remaining allegations of Paragraph 9(e) of the First Amended Complaint.

10.-17. Defendant denies the allegations of Paragraphs 10-17 of the First Amended Complaint.

18. Defendant incorporates herein his responses as set forth in Paragraphs 1-17 above.

19.-20. Defendant denies the allegations of Paragraphs 19-20 of the First Amended Complaint. Defendant denies all allegations not expressly admitted hereinabove. Defendant denies that Plaintiff is entitled to any relief.

FOR A SECOND DEFENSE
(ABSENCE OF PERSONAL JURISDICTION)

21. Defendant reiterates the above allegations not inconsistent with this Second Defense.

22. Defendant lacks, and Plaintiff has not alleged, minimum contacts with the State of South Carolina sufficient to establish personal jurisdiction over Defendant

under the United States Constitution or the laws of the State of South Carolina.

23. In consequence of the foregoing, this Court should dismiss this action as to Defendant.

FOR A THIRD DEFENSE (IMPROPER VENUE AND FORUM NON CONVENIENS)

24. Defendant reiterates the above allegations not inconsistent with this Third Defense.

25. Neither Defendant resides in this judicial district; both reside in the Western District of Pennsylvania.

26. Neither Defendants nor Tru-Tech took actions or made omissions in this district during the period relevant to this claim, and no property that is subject to this claim is situated in this district.

27. Neither Defendant is subject to personal jurisdiction in this district.

28. No evidence concerning this claim is present in this district.

29. In consequence of the foregoing, venue is improper in this action and this forum is an inconvenient one. Accordingly, this Court should dismiss this action pursuant to 28 U.S.C. § 1406(a) or, in the alternative, transfer it pursuant to 28 U.S.C. § 1406(a) or 28 U.S.C. § 1404(a).

FOR A FOURTH DEFENSE (FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED)

30. Defendant reiterates the above allegations not inconsistent with this Fourth Defense.

31. Neither Count of the First Amended Complaint states a claim upon which relief can be granted.

32. In consequence of the foregoing, this Court should dismiss this action.

FOR A FIFTH DEFENSE (FAILURE TO JOIN INDISPENSABLE PARTIES)

33. Defendant reiterates the above allegations not inconsistent with this Fifth Defense.

34. There are other persons who claim an interest relating to the subject matter of this action, whose absence may impede or impair their own interests and leave Defendant subject to substantial risk of inconsistent obligations.

35. Plaintiff has not made such persons parties to this lawsuit.

36. In consequence of the foregoing, this Court should dismiss this action.

FOR A SIXTH DEFENSE (STATUTE OF LIMITATIONS AND LACHES)

37. Defendant reiterates the above allegations not inconsistent with this Sixth Defense.

38. This action was brought after expiration of the applicable statute of limitations.

39. Plaintiff has delayed unreasonably and inequitably in the prosecution of this lawsuit, despite the opportunity to proceed diligently.

40. Defendant has been prejudiced by this neglect.

41. In consequence of the foregoing, this Court should dismiss this action.

FOR A SEVENTH DEFENSE (WAIVER)

42. Defendant reiterates the above allegations not inconsistent with this Sixth Defense.

43. Plaintiff's Second Cause of Action seeks to "pierce the corporate veil" of Tru-Tech, Inc. and hold Defendant

Grant Peacock liable for the benefit of the plaintiff class in C.A. No. 7:87-2243-3.

44. Besides not being a proper claim for which relief may be granted and not including Tru-Tech, Inc. as a party, as noted hereinbefore, this "cause of action" is defective because it should have been raised, if at all, in C.A. No. 7:87-2243-3. By failing to do so, Plaintiff has waived his right to the relief sought under the second count of his complaint.

45. In consequence of the foregoing, this Court should dismiss Plaintiff's Second Cause of Action.

WHEREFORE, Defendant prays that the Complaint be dismissed with costs.

WYCHE, BURGESS, FREEMAN & PARHAM, P.A.

By: /s/ David L. Freeman
DAVID L. FREEMAN [892]
J. THEODORE GENTRY
44 East Camperdown Way
Post Office Box 728
Greenville, South Carolina 29602
803-242-3131—Phone
803-235-8900—Fax
Attorneys for the Defendant
D. Grant Peacock

March 2, 1992

(Certificate of Service Omitted in Printing)